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HUMAN RIGHTS QUARTERLY

Law, Politics, and Treason in South Africa

Mary Rayner *

In 1985 the Afrikaner Nationalist Party Government of South Africa arraigned fifty-six people on charges of treason in eight separate trials. Among the defendants were leading members of the broad-based opposition movement, the United Democratic Front (U.D.F.). Since 1979 the government has resorted increasingly to the use of the charge of treason as popular resistance to white minority rule has grown. The numerous treason trials in 1985 came in the wake of successful campaigns by the U.D.F. and other opposition groups against the government's constitutional and administrative reforms, which opponents saw as mechanisms for perpetuating white minority rule. The massive scale of repression occurring during 1985 exposed the absurdity of the claims of the white minority government to the allegiance of those whom it had arraigned on charges of treason. This paper examines some of the legal and political factors underlying this recent upsurge in treason trials in South Africa.

THE LAW OF TREASON AND THE "TREASON TRIAL" OF 1956

The South African law of treason evolved primarily from Roman-Dutch law and to a lesser extent from English common law. South Africa's legal definition of treason has never been precise. Nevertheless, authorities have agreed that the essential element of treason is "hostile intent." This element

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alone distinguishes treason from lesser common law crimes such as sedition and public violence. Hunt, in his 1970 review of the Roman-Dutch authorities and South African case law, proposed the following comprehensive definition of treason and its essential elements: "High treason consists in any overt act unlawfully committed by a person owing allegiance to a state possessing *majestas* who intends to impair that *majestas* by overthrowing or coercing the Government of that state."[1]

As defined by Hunt, the "overt act" is nothing more than a "manifestation of the hostile intent." Accordingly, an act of treason can encompass collaborating with an external enemy or organizing an armed insurrection against the state in peacetime. Inciting or conspiring to commit treason can likewise constitute an overt act of treason. Further, preparing to carry out an overt act or merely writing or speaking can constitute treason.[2]

With respect to written or spoken words potentially being treasonous acts, Gardiner and Lansdown claim that "where the conduct complained of has consisted of mere words, spoken or written, *not* constituting a conspiracy, or an incitement of others to treason, or an act of counsel or assistance to the enemy, the accused cannot at common law be convicted of high treason in respect of it."[3] Hunt, emphasizing the matter of intent, notes:

> For a man merely to put on paper thoughts which are on his mind or to express (without incitement or conspiracy) hostile sentiments, will not constitute treason, but the reason for this is not that there is no overt act: it is because there is no 'hostile intent.' . . . He does not write or speak in furtherance of an intent to overthrow or coerce the Government.[4]

In all of these possible situations, the accused must have harbored the requisite intent vis-à-vis the state. The defendant, in Hunt's view, must have intended to impair the authority of the state either by overthrowing the government or coercing it in some way. The means employed *may* involve direct force, but force is not a necessary element of treason. Thus, treason

1. 2 Hunt, *South African Criminal Law and Procedure* 2–13 (1970); Gardiner and Lansdown, *South African Criminal Law and Procedure* 992 (6th ed. 1957); *Rex v. Viljoen,* 1923 A.D. 90, 91–95.
2. Hunt, *supra* note 1, at 14; *Rex v. Henning,* 1943 S.A. 172, 173–175 (A.D.); *Rex v. Leibbrandt,* 1944 S.A. 253, 261–262 (A.D.); *Rex v. Mardon,* 1947 (2) S.A. 768, 769–772 (Sp. Ct.); *Rex v. Picnaar,* 1948 (1) S.A. 925, 928 (A.D.); *Rex v. Strauss,* 1948 (1) S.A. 934, 936–937 (A.D.); *Rex v. Neumann,* 1949 (3) S.A. 1238, 1239–1241 (Sp. Ct.); *Rex v. Erasmus,* 1923 S.A. 73, 77–82 (A.D.); *Viljoen,* 1923 at 91–92 (A.D.).
3. Gardiner and Lansdown, *supra* note 1, at 997. In *Henning,* 1943 S.A. at 181, the original conviction was overturned on procedural grounds and not because the accused's act of writing a letter to the enemy of the Crown (Germany) lay outside the scope of potential treasonous overt acts.
4. Hunt, *supra* note 1, at 16.

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also can include other "unlawful but passive means of coercion."[5] Intent, not motivation, is relevant. One must distinguish intention from motivation. The latter may have relevance only as a mitigating factor in the sentencing of an accused. As a South African court once explained:

> Treason may be committed and the hostile intent be entertained with a view to achieving some further purpose. The ultimate goal may be the achievement of some solid or economic advantage for a portion or even for the whole of the community . . . it may be the fulfillment of personal ambition or the wreaking of personal hatred. None of these ultimate motives is relevant to the inquiry whether treason has been committed or not. Whatever the factors are that induce a citizen to entertain an intention to help the enemy or weaken the effort against the enemy, if he acts in order to carry out that intention he commits an act of treason.[6]

In addition to the requisite intention, Hunt stresses that the accused must have directed his intent toward a state which possesses *majestas*.

> [Only] a State which has the full and exclusive right to make laws for its subjects and inhabitants and to enforce these laws, possesses internal *majestas* in relation to its subjects and inhabitants. It is by virtue of this *majestas* that it compels obedience to its laws and respect for its political authority.[7]

Furthermore, only a person who by birth or naturalization owes allegiance to the state can commit treason in relation to the nation.[8]

Finally, the onus rests with the prosecution to prove that the accused committed the overt act with "hostile intent." The state can prove this requisite intent by direct evidence or by inference "from the acts and expressions of the accused and from the surrounding circumstances."[9]

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5. *Id.* at 24–28. Judgments in a number of cases have emphasized the key importance of "hostile intent against the State" in securing a conviction for treason. See, for instance, *Erasmus*, 1923 S.A. at 79; *Leibbrandt*, 1944 S.A. at 279–280. Hunt stresses that while the means do not have to involve force they must be "unlawful," for otherwise "acts directed at the amendment of the constitution, the replacement of the Government or the Head of the State, or the adoption or abandonment of policies or legislation by lawful, constitutional means" would be treasonous. This point is of considerable interest in view of the extreme narrowing, through statutory and regulatory measures since the 1960s, of the range of means considered lawful for bringing about political change in South Africa.
6. *Leibbrandt*, 1944 S.A. at 281; and similarly where no external enemy is involved. *Erasmus*, 1923 S.A. at 75, 79–82.
7. Hunt, *supra* note 1, at 23. He adds: "it is, of course axiomatic that the Republic of South Africa possess *majestas*, and that treason can be committed against that State." In support of this contention Hunt could cite only two cases from the 1940s.
8. Hunt, *supra* note 1, at 20–21. As the judgment in *Neumann*, 1949 S.A. at 1256–1265, makes clear, allegiance also is owed the state by a permanent resident alien.
9. *Leibbrandt*, 1944 S.A. at 282–284; *Erasmus*, 1923 S.A. at 935; *Mardon*, 1947(2) at S.A. 776; Gardiner and Lansdown, *supra* note 2, at 995.

Prior to 1956, treason cases in South Africa arose in the context of war or armed rebellion. The alleged treasonous acts included: collaboration with an external enemy of the state, as in the trials of Leibbrandt and others in the late 1940s for collusion with Nazi Germany; collaboration with armed rebels against the state, as in the trials of the Afrikaner rebels for supporting the anti-British cause during the Anglo-Boer war (1899–1902), and the trial of Zulu Chief Dinizulu from 1908 to 1909 on twenty-three counts of treason arising out of his alleged complicity in the Zulu rebellion of 1906; or armed rebellion against the state, as in the 1915 trial following the rebellion of Generals de Wet and Beyers, and in the trials following the 1922 insurrection by white goldminers in the Transvaal province.[10]

The pre-1956 trials suggest that the South African State regarded as treasonable only those overt acts which involved some form of violence against the state or active collaboration with an external enemy during periods of war. However, this situation changed in 1956 with the watershed "Treason Trial," which was the first treason case to occur after the Afrikaner Nationalist Party rose to power in 1948.[11]

The 1956 trial came in the wake of a nonviolent campaign against the apartheid policies of the new Nationalist Party government. A coalition of organizations comprising what came to be known as the "Congress Alliance," the African National Congress (A.N.C.), the South African Congress of Trade Unions (SACTU), the South African Indian Congress (SAIC), the Congress of Democrats, and the South African Coloured People's Organization, led the anti-apartheid campaign. In December 1956, the government arrested 156 members of these organizations. Following a lengthy preparatory examination,[12] the state dropped charges against sixty-five people, and the remaining ninety-one stood trial for high treason in August 1958. The prosecution withdrew the indictment in October and issued a new one against thirty of the accused, whose trial resumed in August 1959. Despite the State of Emergency declared in March 1960 in the

10. Hunt, *supra* note 1, at 12; J. Dugard, *Human Rights and the South African Legal Order* 209–211 (1978).
11. The Afrikaner Nationalist Party (N.P.) won the 1948 elections partly on the basis of its hard-line apartheid policies. Within a few years the government had moved to implement the new social order with such measures as the Group Areas Act (1950), the Immorality Amendment Act (1950), the Population Registration Act (1950), the Bantu Authorities Act (1951), the Reservation of Separate Amenities Act (1953), and the Bantu Education Act (1953), all of which were intended to produce a totally segregated society and maintain the political and economic dominance of the white minority. Study Commission on U.S. Policy Towards Southern Africa, *South Africa: Time Running Out* 48–66, 117–119 (1981); R. Davies, *The Struggle for South Africa* (1984).
12. Prior to 1962 South African law mandated that a preliminary inquiry into the guilt of the accused, known as a preparatory examination, be held before a magistrate prior to a Supreme Court trial.

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Id. at 658.
16. *Id.* at 650.

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wake of the Sharpeville shooting the trial continued throughout that year.[13] Finally, in March 1961 the Special Criminal Court in Pretoria unanimously acquitted the defendants.[14]

In the initial 1958 indictment, the prosecution alleged that, during the period 1 October 1951 to 13 December 1956, the accused while acting in their individual capacities or as members of specific organizations committed high treason. The prosecution charged that the defendants, acting with hostile intent and common purpose, inter alia, disturbed the independence or the security of the state; each accused committed certain hostile and overt acts against the state. The prosecution alleged that during this period, the defendants conspired with each other and with others not indicted to subvert the state and to make active preparation for a violent revolution against the state.[15] The prosecution further alleged that the defendents attempted to accomplish the objects of their conspiracy by, among other acts, organizing a gathering known as the Congress of the People for the adoption of the Freedom Charter; organizing a special militant corps of Freedom Volunteers; instigating each other and others to use extra-parliamentary, unconstitutional and illegal methods, including the use of violence; organizing various campaigns against existing laws; promoting discontent or hostility among the various races of the country; advocating the adoption of a Marxist-Leninist doctrine in the country and the necessity of establishing a Communist state; advocating the establishment of a government intended to replace the present regime by illegal and unconstitutional means and inciting the population of the country to take part in and support by mass action the above activities.[16]

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13. On 21 March 1960, a large crowd of Africans gathered outside a police station in the township of Sharpeville south of Johannesburg to stage a demonstration against the law mandating that Africans must carry passes. Although this demonstration had been part of an ongoing nonviolent campaign against *apartheid* laws, white police opened fire on the unarmed crowd, killing sixty-nine men, women and children. Most of them were shot in the back. *South Africa: Time Running Out*, *supra* note 11, at 173.
14. Dugard, *supra* note 10, at 213–214; Karis, "The South African Treason Trial," 76 *Pol. Sci. Q.* 223, 226 (June 1961); Gardiner, "The South African Treason Trial," 2 *J. of the Int'l Commission of Jurists* 51 (Autumn 1957).
15. *Rex v. Adams and Others*, 1959(1) S.A. 646, 649 (Sp. Ct.). In part B of the indictment it was alleged that the conspiracy had six aims:

    (a) to overthrow the State, and/or
    (b) to make active preparation for a violent revolution against the State, and/or
    (c) to disturb, impair, or endanger the existence of the State; and/or
    (d) hinder, hamper or coerce the State, and/or
    (e) oppose and resist the authority of the State and in particular the power of the State to make and enforce laws, and/or
    (f) establishing a Communist state or some other state in the place of the existing State.

    Id. at 658.
16. *Id.* at 650.

The prosecution alleged that the defendants furthered their conspiracy by attending and addressing certain meetings; making or associating themselves with speeches and resolutions allegedly calculated to incite people to engage in the activities necessary to achieve the goals of the conspiracy; writing, publishing, and distributing books, articles, and pamphlets calculated to incite people in the same manner; and attending a gathering known as the Congress of the People convened to adopt the Freedom Charter on 25 and 26 June 1955. The prosecution did not allege that the accused committed a single act of violence.[17]

The defense moved to quash the indictment on several grounds. Concerning the nature of the purported conspiracy, the defense argued that the prosecution failed to offer any facts proving that the defendants had contracted with one another directly or indirectly. The defense also challenged the prosecution's allegation that there was a single conspiracy whose terms remained constant and static throughout the period covered by the indictment. According to the further particulars, some of the accused were charged with conspiring with persons who were not in the conspiracy until well after the Congress of the People gathering in June 1955, even though the prosecution claimed that holding the Congress was one of the aims of the conspiracy. Some of the laws specified in the indictment to target organized campaigns did not even exist in 1952, when the conspiracy allegedly began. In response to these arguments, the court supported the contention of the prosecution:

> As long as the conspiracy remains constant in regard to its *aims,* and as long as the aims are unlawful, the particular or varying means adopted by any one of the conspirators are attributable to the others, provided that they were employed for the purposes of achieving the so-called 'grand object.'[18]

The court rejected the defense arguments that an accused could not be liable criminally for offenses committed by his co-accused prior to his having joined the conspiracy, and that an accused could be tried only for the commission of his own overt acts. The court found that the indictment had brought "all the accused to court on one charge of high treason, admittedly based on a series of overt acts which . . . nevertheless, constituted a 'course of conduct' directed towards the achievement, and in pursuance of but one criminal design, namely to overthrow the state." The exact timing of the participation by any one of the accused was irrelevant to the proof of the main charge.[19]

17. *Id.* at 651, 665; Blom-Cooper, "The South African Treason Trial: *R. v. Adams and Others,*" 8 *Int'l Comp. L. Q.* 66 (1959).
18. *Adams,* 1959 (1) S.A. at 660–661.
19. *Id.* at 666–668.

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22. *Adams,* 1959 (1) S.A. at 656.
23. Karis, *supra* note 15, at 227.
24. *Id.* at 224–230.
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Although the court sustained the main part of the indictment, the prosecution withdrew it in October 1958. In 1959 the trial resumed under a different indictment against thirty defendants.[20] One of the main issues in this second trial concerned the question of violence and the nature of the overt acts upon which the prosecution relied as proof of hostile intent. The defense argued that where the acts consisted of spoken or written words only, "such words in the absence of an external enemy should at the very least amount to an incitement to violence or sedition." The court ruled against this contention, "provided the words, in the circumstances, manifest the hostile intent and provided they tend towards the accomplishment of the criminal design."[21] This ruling was made despite the fact that the court earlier had acknowledged that many of the speeches or portions thereof "might be considered to be innocuous."[22]

The prosecution's main strategy focused upon proving that the accused intended to act violently, a significant departure from the prosecution's approach in the first trial the previous year. The accused must have known, argued the Chief Prosecutor, that to achieve the aims of the Freedom Charter, the defendants were on a violent collision course with the state. The Congress Alliance, as the "vanguard" of the "National Liberatory Movement" in South Africa, was part of an international communist conspiracy "pledged to overthrow by violence all governments in noncommunist countries where sections of the population did not have equal political and economic rights."[23] According to the prosecution's argument, the nature of communism illuminated the conspirators' intentions. The defendants' spoken and written words, their attendance at meetings, their possession of documents and so forth, however apparently innocent, when seen in this broader context, clearly were committed in furtherance of the treasonable conspiracy.[24]

The court acquitted all of the defendants in March 1961 when the court found it impossible to conclude that the A.N.C. and the Congress Alliance had "acquired or adopted a policy to overthrow the state by violence."[25] While the judgment represented the Nationalist Party government's failure to curb extra-parliamentary dissent through the use of the treason charge, the long drawn-out and enormously expensive trial did have other important political consequences. One observer of the trial, Professor Thomas Karis, noted that throughout its duration the proceedings had "immobilized or

20. The Prosecution had withdrawn the first indictment in October 1958 following the quashing of the first alternate charge under the Suppression of Communism Act (1950), Blom-Cooper, *supra* note 17, at 59.
21. Karis, *supra* note 14, at 222.
22. *Adams*, 1959 (1) S.A. at 656.
23. Karis, *supra* note 15, at 227.
24. *Id.* at 224–230.
25. *Id.* at 239–240.

preoccupied many leaders of both the African National Congress"[26] as well as other organizations. The trial drained the energies and resources of individuals and groups who assisted the defense. Further, the trial posed the potentially intimidating question: did the "breadth of the prosecution's argument leave open any extra-parliamentary outlets for free speech or agitation?"[27] The area between legal, constitutional methods and treason could be easily constricted, as Karis points out, under the historic "intent and tendency" test of what constitutes an act of treason.[28]

1961–1978: POLITICAL TRIALS UNDER STATUTORY LAW

For nearly two decades after the conclusion of the Treason Trial, the South African State charged the accused in major political trials with statutory offenses rather than with the common law treason. The charges were made primarily under the Suppression of Communism Act, the Unlawful Organisations Act, the Sabotage Act, the Terrorism Act, and the Internal Security Act in its 1976-amended form.[29] Most of the statutory offenses overlapped with treason, sedition, public violence, and other common law crimes, but the statutes also created many offenses *sui generis*. In the case of the now repealed Terrorism Act of 1967, the offenses defined by the statute were equated with high treason.[30] However these statutes did not merely codify common law. The new statutory offenses were "widely, vaguely, and unclearly phrased . . . [and offended] the certainty-of-law requirement inherent in the notion of legality."[31]

During this period the government made important changes in pretrial and trial procedures which had a serious impact on the substantive rights of the accused. Perhaps one of the most crucial changes concerned the issue of the burden of proof. At common law, the prosecution has the burden of proving the main element of treason, hostile intent. However, with the Terrorism Act, for instance, the onus of proof was shifted to the defendant. Under that statute, a person commits the capital crime of "participation in

26. *Id.* at 233.
27. *Id.* at 234–235.
28. Karis, *supra* note 14, at 232–240; Dugard, *supra* note 10, at 214; Gardiner, *supra* note 14, at 51.
29. Suppression of Communism Act, No. 44 of 1950; Unlawful Organisations Act, No. 34 of 1960; The General Law Amendment Act, No. 76 of 1962, § 21 (created the offense of sabotage and is popularly referred to as the Sabotage Act); Terrorism Act, No. 83 of 1967; Internal Security Amendment Act, No. 79 of 1976. Dugard noted in 1977 that this absence of common law treason charges was occurring despite the fact that there had been more political trials during the previous fifteen years than at any other stage of South Africa's history. Dugard, *supra* note 10, at 267.
30. Terrorism Act, *supra* note 29, at sec. 2(1); see Hunt, *supra* note 1, at 34–37.
31. Dugard, *supra* note 10, at 267.

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32. Terrorism Act, *supra* note 29,
33. *Id.* at sec. 2(2).
34. Dugard, *supra* note 10, at 263
35. *Id.* at 233–234, 258.

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nt, *supra* note 1, at 34–37.

terroristic activities" if, "with intent to endanger the maintenance of law and order in the Republic, . . . he commits any act in the Republic or elsewhere."[32] The law *presumes* an intention to endanger the maintenance of law and order if the act the prosecution proved the accused committed had or was likely to have had any one of a number of specified results in the Republic. The list was sweeping:

> . . .
> (b) to promote, by intimidation, the achievement of any object;
> (c) to cause or promote general dislocation, disturbance or disorder;
> (d) to cripple or prejudice any industry or undertaking or industries or undertakings generally or the production or distribution of commodities or foodstuffs at any place;
> (e) to cause, encourage or further an insurrection or forcible resistance to the Government or the Administration of the territory;
> (f) to further or encourage the achievement of any political aim, including the bringing about of any social or economic change, by violence or forcible means or by the intervention or in accordance with the direction or under the guidance of or in cooperation with or with the assistance of any foreign government or any foreign or international body or institution;
> . . .
> (l) to embarrass the administration of the affairs of the State.[33]

To establish his innocence, the accused person had to prove *beyond a reasonable doubt* that he did not intend any of the above results when he committed the proven act. Only in this way, as Dugard points out, could a defendant rebut the presumption that he acted with intent to endanger the maintenance of law and order.[34] By shifting the burden of proof so dramatically onto the accused, the state reduced the chances of embarrassing acquittals such as occurred during the 1956 to 1961 treason trial.

Further procedural changes ameliorated the state's position. Before 1961, treason cases in South Africa were heard in special criminal courts which involved three judges who were required to reach a majority verdict constituted under the Criminal Procedure Act. After 1961 political cases were heard by a judge sitting alone or with assessors, and after 1977, in limited cases, by regional magistrates.[35] This trend, together with the drastic curtailment of procedural rights resulting from the system of incommunicado detention without charge and the expanded powers of the Attorney General to deny bail to persons charged with political offenses effectively transformed the South African pretrial process into an "inquisitorial

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32. Terrorism Act, *supra* note 29, at sec. 2(1).
33. *Id.* at sec. 2(2).
34. Dugard, *supra* note 10, at 263.
35. *Id.* at 233–234, 258.

system."[36] The sweeping statutory definitions of "political crimes" and the limited role of the judiciary, increased further the possibilities of securing convictions.

1979–1985: THE REAPPEARANCE OF TREASON TRIALS

Despite the advantages for state prosecutors in using statutorily defined charges against political opponents of the government, a resurgence in the use of the common law treason charge began in 1979. In that year twelve alleged members of the banned African National Congress (A.N.C.) were convicted of high treason in the Natal Supreme Court. From 1980 to the end of 1983, the government tried thirty-seven people for treason in fifteen separate trials. In 1983, of the forty-two persons detained and subsequently charged under section 29 of the Internal Security Act, nine were convicted of high treason. In 1985, fifty-six people were charged with treason, eight of whom were convicted, sixteen were acquitted, and thirty-two were still standing trial at the end of the year.[37]

One common thread running through many of these recent trials has been the state's allegation that membership in or support for the A.N.C. amounts to treason. Typical was the construction given in the 1982 case, *State v. Mogoerane, Mosololi & Motaung,* heard in the Supreme Court (Transvaal Provincial Division). In the indictment the Attorney General alleged that the aim of the A.N.C. is to overthrow or endanger the lawful government of the Republic of South Africa by force or threats of force.

In carrying out these aims, the prosecution alleged, the A.N.C. and its members and active supporters had co-opted persons in the Republic to support and join the A.N.C.; had recruited and organized people in the

36. *Id.* at 269–273. Section 17 of the General Law Amendment Act No. 37 of 1963 permitted 90-day detention without right of access to a legal adviser. In 1965 this was extended to 180 days in an amendment to the Criminal Procedure Act No. 96 of 1965. The 1967 Terrorism Act permitted indefinite, incommunicado detention for the purposes of interrogation. Torture, and in some cases the deaths of detainees, has become an ugly and persistent feature of this "drastic process." See the annual reports of Amnesty International and the United States Department of State annual Country Reports on Human Rights practices. Regarding bail, the Attorney General was empowered, under a 1976 amendment to the Internal Security Act No. 44 of 1950, to issue an order that a person arrested on a charge of having committed sedition, treason, sabotage, terrorism or certain offenses under the Internal Security Act not be released on bail before sentence has been passed or before he has been discharged. There were no time constraints within which the court must be seized of the case, in contrast with nonpolitical cases where the Attorney General's extraordinary power was at least constrained by the requirement that the trial commence within 90 days. See Section 61 (1) of the Criminal Procedure Act of 1977.

37. *State v. Mange,* 1980 (4) S.A. 613, 615–616 (A.D.); South African Institute of Race Relations, *1983 Survey of Race Relations in South Africa* 557; Laurence, "Activism on Trial," *Africa Report* 19 (March-April 1986).

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Republic to undergo military training; and had distributed weapons to persons to use in warfare, sabotage, and the general undermining of the authority of the Republic. The Attorney General then alleged that the accused at all relevant times, between 1976 and 1981, were members or active supporters of the A.N.C. and had conspired with other A.N.C. members and active supporters to further the unlawful aims of the A.N.C., and had committed specific acts in furtherance of this conspiracy. Accordingly, the prosecution argued, the defendants were guilty of high treason.

The overt acts alleged against the accused included undergoing military training in A.N.C. camps outside the country, establishing underground bases inside South Africa, and carrying out armed attacks on three police stations which resulted in the death of one policeman. The court convicted the defendants of treason and twenty alternative charges. The accused were sentenced to death and executed.[38]

The trials involving alleged A.N.C. members accused of committing various acts of sabotage constitute the most numerous and important category of the recent treason cases.[39] The defendants in these trials usulily have been young men who apparently fled South Africa after the 1976 student uprisings and allegedly underwent military training in foreign countries, returning to carry out or attempt to carry out acts of sabotage against government buildings and key installations. The overt acts alleged sometimes included armed attacks on police stations, resulting in the injury or death of policemen. Typically, the defendants were placed on trial only after lengthy periods of detention during which they were subjected to various forms of physical and psychological assault to force them to admit specific acts of terrorism.[40]

While the state prosecuted the defendants in these cases under statutory law for allegedly committing acts involving violence, the gravamen of the main charge of common law treason against them appears to have arisen primarily from the accuseds' alleged membership in and conspiracy with the A.N.C. The case of *State v. Barbara Hogan*, heard in 1982 in the Supreme Court (Witwatersrand Local Division), illustrates the manner in which the

38. South African Institute of Race Relations, *1982 Survey of Race Relations in South Africa* 236–237. The alternate charges were mainly murder, attempted murder, and contraventions of the Terrorism Act.
39. These cases include *Mange* 1980(4) S.A. at 615–617; *State v. Tsotsobe & Others* (Pretoria Supreme Court 1981); *State v. Lubisi & Others*, 1982(3) S.A. 113, 113–122 (A.D.); *State v. Mokoena* (Pretoria Supreme Court, 1982); *State v. Molotsi & Molefe* (1983); *State v. Skweyiya* (Natal Supreme Court, Pietermaritzburg, 1983); *State v. Mahlobo & Others* (Natal Supreme Court, 1984); and *State v. Mhlanzi & Others* (Transvaal Supreme Court, Witwatersrand Local Division, 1984) (not all of the cases have been reported).
40. As for instance in the case of *State v. Mogoerane & Others* where the accused contested the validity of the confessions made to the police on the basis that they had been made as a result of assault and torture by electric shock while they were being held by the Security Police. *Survey of Race Relations in South Africa*, *supra* note 38, at 237.

state has sought to establish membership in the A.N.C. alone as amounting to participation in a treasonable conspiracy. Commenting on this trial, the Johannesburg *Financial Mail* observed:

> Evidently the legal approach of the Attorney-General's office has shifted to moulding common law precedent rather than utilising the numerous statutory tools available. In the last three years charges of treason have increased in number against people who have undergone military training and who have been infiltrated back to commit sabotage and other acts of violence. [The Hogan trial] is the first charge of treason where there was no question of violent acts involved.[41]

In the indictment, the state accused Hogan of membership in the A.N.C. and of associating herself with the A.N.C.'s unlawful aim of overthrowing the government "by means of violence or means which envisage violence and by other means, including the crippling or prejudicing of industries or undertakings generally in the Republic."[42] Accordingly, the state claimed, the accused was guilty of high treason. Amplifying this charge, the indictment alleged that during the period from 1977 to 1981 the accused unlawfully and with hostile intent against the state conspired with the A.N.C. and its members and supporters to further the aims of the A.N.C., and committed or attempted to commit various acts in furtherance of that conspiracy. The overt acts alleged included joining the A.N.C. in 1977, agreeing to convey information on labor matters to the A.N.C., contacting exiled A.N.C. officials, and recruiting new members for the A.N.C. In addition, the prosecution alleged that the accused, in furtherance of the A.N.C. aims, had negotiated with the South African Allied Workers' Union to establish an Unemployed Workers' Union, and had worked as a volunteer with an unemployment bureau for black workers, and in various capacities with other similar organizations.

Barbara Hogan entered a plea of not guilty to the main count of high treason and to the first alternate count of participating in terrorist activities under the Terrorism Act of 1967, but pleaded guilty to two charges under the Internal Security Act of 1950 relating to her admitted membership in a banned organization. The state refused to accept that her membership in the A.N.C. amounted to a mere technical breach of statutory law, rather than common law treason. As Judge Van Dyk noted in his judgment on October 20:

> [It is] clear that the state inter alia relies upon the acts of Hogan in joining the A.N.C. . . . in 1977 and thereafter working for the A.N.C. from 1977 to 1981 to prove the conspiracy to commit treason, alternatively terrorism, and that the

41. *Financial Mail,* 19 October 1982.
42. Indictment in *State v. Barbara Hogan* (unreported case).

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> acts . . . are alleged to be treasonable, alternatively terroristic in nature, because of the accused's association with the A.N.C. and the fact that they were allegedly committed in furtherance of its aims and objects.[43]

The court convicted Barbara Hogan of treason and sentenced her to ten years imprisonment. In reaching his conclusion, Judge Van Dyk dismissed the arguments of Advocate George Bizos on behalf of the accused regarding the essentially nonviolent nature of her actions. Van Dyk considered this fact irrelevant, asserting that the overt acts necessary for treason can manifest themselves "in perfectly legal behaviour." Acts are treasonous if performed with the ultimate aim of assisting the enemy or weakening the efforts against the enemy. Primarily on the basis of the testimony of a police spy, Captain Craig Williamson, Judge Van Dyk concluded that the A.N.C. regarded itself as being at war with the Republic of South Africa on all fronts, that everything the A.N.C. did was aimed at the violent overthrow of the state, and that the encouragement of nonviolent political forms of struggle, as for instance in the organizing of unemployed workers, was simply a tactic used to achieve the overall aim of overthrowing the state by violence. Accordingly, the Judge held, "by joining the A.N.C., and thereafter, performing the specific acts which have been proved to have been performed by her, [Hogan] signified by her conduct her agreement with all the aims of the organization and has therefore made herself guilty of a conspiracy to commit treason."[44]

There are a variety of reasons for the recent resurgence in the state's use of the common law treason charge against political opponents. One purely technical reason concerns the simplification of the procedures for proof in criminal cases, including treason, as a result of an amendment to the Criminal Procedure Act in 1977. Prior to that year, every overt act of treason required the corroborating testimony of at least two competent witnesses. As a consequence of the 1977 amendment to the Act, only one competent witness now is required. Treason has become easier to prove.[45]

More importantly, however, was the South African Government's sensitivity to the longstanding international criticism of the country's use of statutory offenses, such as "terrorism" as broadly defined by the 1967 Terrorism Act, especially where the statutes carried the death penalty. Treason, as defined at common law, was not an offense created by the apartheid

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43. Judgment in *State* v. *Hogan*, at 18.
44. *Id.* at 22–31, 40.
45. In *Henning*, 1943 S.A. at 176, 181, the original conviction was overturned because the provisions of the earlier Criminal Procedure Act with respect to the testimony of two credible witnesses had not been complied with. Criminal Procedure Act, No. 51 of 1977, sec. 208; Gardiner and Lansdown, *supra* note 2, at 991.

state, but common to the legal tradition of South Africa's major western allies.[46]

The Nationalist Party government's renewed use of the charge of treason against its opponents also has occurred in the context of continued and heightened popular resistance to the apartheid system, and in the aftermath of a crisis within the government, leading to the emergence of the South African military as a significant political force. From the mid-1970s, the white minority government was forced to adopt a defensive posture by the growth of the independent trade union movement and black student militancy, the expansion of grassroots community organizations, and the popular resurgence of the banned African National Congress (A.N.C.). The Soweto and related uprisings of 1976 and 1977 and the brutal police response to them, had underscored the inability of the Vorster government to maintain control over the economically important urban, black population. In 1978 J. B. Vorster was replaced as Prime Minister by P. W. Botha, who had served as Minister of Defence for fourteen years. With this change, the South African military became increasingly influential in the formulation of all aspects of state policy. This influence was manifested particularly through the military's presence in the crucial State Security Council, and the close relationship between Botha and his Minister of Defence, General Magnus Malan.[47]

The increasing militarization of South African society from the late 1970s involved the official propagation of, in effect, a counter-insurgency or counter-revolutionary doctrine known as "Total Strategy." Malan was a major architect of the 1977 White Paper on Defense which had called for a "total strategy" to counter "the multi-dimensional onslaught against the Republic of South Africa in the ideological, military, economic, social, psychological, cultural, political and diplomatic fields."[48] The White Paper called for coordinated action between government departments and institutions, and other influential groups, such as the business sector, to counter what Malan called the "total war" against South Africa.[49]

Since 1979 the Botha government strategy has involved combining military force, used both regionally and internally, in conjunction with police power, and a package of reforms, to cut the ground from beneath the regime's domestic opponents and its international critics, while preserving

46. Dugard, *supra* note 10, at 262–264; Laurence, "South African Treason Trials Reflect New Government Priorities," *Christian Science Monitor*, 15 April 1985. It should be noted, though, that the prosecution in recent treason cases invariably has joined a main charge of treason with alternate charges under the security laws. The state has not been prepared to abandon the procedural advantages of charges under the latter.
47. Davies, *supra* note 12, at 32–42, 182–185; P. Frankel, *Pretoria's Praetorians: Civil-Military Relations in South Africa* 34–35, 68 (1984).
48. Frankel, *supra* note 47, at 46, 54, 62.
49. *The Rise of the South African Security Establishment* 4 (1983).

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white supremacy.[50] In this context, the state's use of the charge of treason reflects an attempt to achieve the significant propaganda goal of stigmatizing anti-apartheid activists as criminals and agents of foreign enemies engaged in a "total onslaught" against South Africa.

This propaganda purpose underlies the trials which took place or began in 1985. The indictments in the various cases encompassed a wide range of alleged overt acts, from songs sung at public meetings to acts of sabotage against government property. The thread linking these apparently different trials was the state's accusations concerning the defendants' relationship with the A.N.C. In two key trials, *State v. Mewa Ramgobin and 15 Others,* heard in the Supreme Court (Natal Provincial Division), and *State v. Patrick Baleka and 21 Others,* which finally began in the Supreme Court (Transvaal Provincial Division) in January 1986, leading members of the U.D.F. and a number of affiliated organizations were charged with conspiring with the A.N.C. to overthrow the government by violence. The state's case against twelve of the defendants in the Natal trial collapsed within two months of its commencement in October.[51] While this appeared to set back the government's efforts to brand as illegal the political programs and practices of the U.D.F., the outcome of the second trial may temper such a conclusion.

In *State v. Patrick Baleka and 21 Others,* the defendants face a main charge of treason and alternate charges of terrorism, subversion, furthering the aims of an unlawful organization, and five counts of murder. The majority of the accused were detained in late 1984. They finally were indicted in June 1985 in connection with events occurring during the uprising in the townships in the Vaal Triangle area south of Johannesburg in September 1984. All of the defendants were denied bail.

In contrast to the Natal trial where the state alleged that the U.D.F. had been infiltrated and used by the A.N.C., the indictment in this second trial alleges the existence of two separate conspiracies. The first one involves the A.N.C. acting in alliance with the South African Communist Party. The formation of the U.D.F. in 1983 is construed as a move to give effect to the alleged aim of this alliance, the violent overthrow of the government. The state also alleges that the U.D.F. is a sole party in a separate conspiracy with

50. Frankel, *supra* note 47, at 52, 58, 69. It is no coincidence that two crucial commissions of inquiry, the Wiehahn and the Riekert which recommended certain changes in the system of job reservation and the pass laws governing the position of urban black workers and their families, reported in 1979. In that same year two other important commissions, the Rabie and the Hoexter, were established to inquire into the operation of the security laws and the structure of the courts. Davies, *supra* note 11, at 40, 177; the Report of the Commission of Enquiry into Security Legislation, February 1982, para. 1.1; The Report of the Commission of Enquiry into the Structure and Functioning of the Courts, 1983, Part A, para. 1.1.1.
51. The state withdrew charges against twelve of the defendants on December 9, following the failure of its main expert witness, Isaak de Vries, to stand up under cross-examination. The trial of the remaining four defendents resumed in February 1986.

a similar objective. All the accused are alleged members of conspiracies in that the defendants are either members of the U.D.F. National Executive Committee or the executives of affiliate bodies or active supporters of those bodies. Through a complex common purpose argument in the indictment, the state has construed every action and decision taken, every meeting held and campaign organized on a national or local level since the formation of the U.D.F. as having been done "pursuant to" the alleged conspiracies.

The trial, which already has imposed great hardships on the defendants and their families, may have a serious impact upon the ability of the U.D.F. and other grassroots organizations to operate legally and effectively in South Africa. The opportunity for nonviolent and legal opposition politics on the part of the disenfranchised majority has been narrowed disastrously since the 1960s. In this terrain, the "vagueness and openness to abuse of the definition of treason," as Karis described it,[52] assists the government in its determination to criminalize the actions of its opponents. It is a tactic which ironically underscores the central problem: the complete denial of political rights to the majority of South Africans.

52. Karis, *supra* note 14, at 234.

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